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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-845

ADOLPH COORS COMPANY,
Petitioner

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
AN AGENCY OF THE FEDERAL GOVERNMENT,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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ADOLPH COORS COMPANY, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AN AGENCY OF THE FEDERAL GOVERNMENT, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Adolph Coors Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 7, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals in this case (App. A, 17-19) is not yet officially reported. The companion case decided by the Court of Appeals and relied upon in this case (App. B, 20-25) is reported at 461 F.2d 1055. The opinion of the Federal District Court for the District of Colorado (App. C, 26-32) is reported at 320 F. Supp. 1025.

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JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on August 7, 1972. A timely petition for rehearing *en banc* was denied on October 4, 1972, and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the instant "Commissioner's Charge" sets forth the facts upon which it is based as required by Section 706(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), as amended, and is a valid Charge.

2. Whether the "Commissioner's Charge" properly alleges an unlawful employment practice as defined in Sections 703(a) (1) and (2) of the Act, 42 U.S.C. § 2000e-2(a) (1) and (2), as amended, and is a valid Charge.

STATUTE INVOLVED

This action involves only the Civil Rights Act of 1964, as amended.

Sections 703(a) (1) and (2) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1) and (2), define employer unlawful employment practices as follows:

> (a) It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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Section 703(a) (2) of that Act was amended by the Equal Employment Opportunity Act of 1972 as follows, 42 U.S.C.A. §2000e-2(a) (2) (Amendment underscored):

> (a) It shall be an unlawful employment practice for an employer –
>
> * * * * * * * * * * * * * * *
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 706(a) of the Act, 42 U.S.C. §2000e-5(a), sets forth specific requirements which must be met in the filing of charges under the Act:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission.

Section 706 was amended in part relevant here, 42 U.S.C.A. §2000e-5(a) and (b), as follows by the Equal Employment Opportunity Act of 1972, which amendment requires that a notice of charge under the Act include date, place and circumstances of the alleged unlawful employment practice:

> (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

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(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof.

That Amendment basically adopted the prior standards of the EEOC published as its Rules and Regulations in 29 C.F.R. 1601.11(a) (1), (2), (3) and (4) which required that charges under the Act contain the pertinent facts including dates of alleged violations.

Other provisions of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972 with respect to investigations, subpoenas, limitation periods for timely charges and specific provisions against employer action granting preferential treatment to any individual or group to remedy racial imbalance are set forth in Appendix D (33-36 herein) and will be referenced as necessary in the discussion *infra* in this petition.

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STATEMENT OF THE CASE

The jurisdiction of the Federal District Court below was invoked pursuant to the authority of Section 710(c), 42 U.S.C. §2000e-9(c), of the Civil Rights Act of 1964. That section of that Act authorized the company to petition the Federal District Court to set aside a demand for access to evidence served upon it by the respondent Commission in this matter under the aforesaid Act.

The Commission filed that demand for access to evidence based upon the following "Commissioner's Charge" which Charge was filed by Commissioner Vincente T. Ximenes on February 24, 1969 (App. E 2, f)[1]:

> I have reasonable cause to believe that the above employer is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Section 703(a) of the Civil Rights Act of 1964 by discriminating against Negros, American Indians and Spanish Surnamed Americans on the basis of race or national origin, respectively, with respect to recruitment and hiring, in that the Respondent discriminatorily fails or refuses to recruit or hire Negros, American Indians or Spanish Surnamed Americans in the same manner as it recruits and hires others.

The Commission's demand for access to evidence requested that the following information be supplied by the Company. (App. E 2, h-i):

1. List of all employees showing date hired, job title, rate of pay and ethnic or racial identity.
2. Provide job qualifications for all job classifications.
3. Copies of all employment tests used and the norms.

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[1]The index containing the record below was previously submitted on October 30, 1972 to the Clerk of the Supreme Court of the United States by the Clerk of the United States Court of Appeals for the Tenth Circuit, and is accordingly separately indexed from Appendices A through D which appendices are printed as a part of this petition. That record is denominated Appendix E, and the individual pages of the listed documents contained therein are listed by small letters, as e.g. 2a.

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4. List of promotions from July 1, 1968 to June 30, 1969, including job classification and ethnic or racial identity.

5. List of job openings from July 1, 1968 to June 30, 1969.

6. List of recruitment sources and copies of employment requests.

7. Make available for examination all job applications and copy as needed.

8. List of all employees terminated for cause from July 1, 1960 to June 30, 1969.

9. Make available for interview under oath any agent, official or employee and examine any records of Adolph Coors Company relevant to Charge File No. TAL 9C0362.

10. Permission to tour and observe employees at the Adolph Coors Company facility at Golden, Colorado.

11. Copy of most recent EEOC-1 Form.

The Adolph Coors Company then filed its petition to set aside such demand of the Commission, supplying numerous bases in such petition for that requested action by the Court (App. E 2, a-e).

Petitioner asserted in said petition to set aside the demand for access to evidence, *inter alia*, that the Commissioner's Charge was invalid since it did not set forth any facts upon which it was based (App. E, 2-b, App. E, 2-f and g); because no statutorily defined unlawful employment practice was alleged (App. E, 2c, and App. E, 2j); and because the Civil Rights Act of 1964 expressly precludes preferential recruitment and hiring requirements for minority employees in Section 703(j), 42 U.S.C., §2000e-2(j) (App. E 2, c, d, and m).

The Federal District Court subsequently on January 11, 1971 issued its decision (App. C 26-32) holding that the Commissioner's Charge was invalid and stating that:

> If the Commissioner's charge is invalid so also is the Commissioner's demand for evidence and testimony under oath and we will not reach the other questions raised by the parties at this time. (App. C 30)

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The Decisions Below

The Federal District Court ruled on the merits as follows:

In the Court's opinion, the requirement that the charge set forth the facts upon which it is based, is a necessary prerequisite to a valid charge and a valid charge is a necessary prerequisite to a valid demand, pursuant to Section 2000e-9.

The arguments of the commission to the contrary and the authority cited in support of the commission's argument are not persuasive. The Court should not and cannot ignore the congressional mandate that the charge must be supported by the facts which led the Commissioner to believe that a violation had occurred. The mere conclusory statement that the Commissioner has "reasonable cause to believe" there has been a violation by discrimination is not a statement of fact. The Court concludes the charge does not meet the statutory requirements and is invalid; that the demand served upon Petitioner is likewise invalid, and should be set aside. (App. C 30-31)

On appeal to the United States Court of Appeals for the Tenth Circuit, this decision of the Federal District Court was reversed on the authority of the prior decision of the Court of Appeals for the Tenth Circuit in its companion case of *Spartan Southwest, Inc. v. Equal Employment Opportunity Commission,* ____ F.2d ____ ,(App. B 20-25) which had been decided by the Court of Appeals while the instant case was pending before that same court. That 4 to 3 decision by the seven permanent circuit judges, *en banc,* in *Spartan Southwest, Inc., v. EEOC, Supra,* reversed the prior decision in that case by the Court's three judge panel which had held the charge to be invalid for failing to set forth the facts upon which it was based. Three of the circuit judges entered a spirited dissent to the majority opinion in *Spartan Southwest, Inc., v. EEOC, Supra* (App. B 24-25).

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Petitioner argued to the Court of Appeals below, *inter alia*, that the charge did not set forth any facts (Brief of Appellee, page 5); that the charge failed to allege any statutorily defined unlawful employment practice (Brief of Appellee, page 15); and that the statement in the Commissioner's Charge that the Company fails to recruit and hire minorities in the same manner it recruits and hires others does not constitute an unlawful practice under the Act (Brief of Appellee, page 15).

In reversing the Federal District Court on the basis of its prior decision *en banc* in *Spartan Southwest, Inc., v. EEOC, Supra*, the Court of Appeals stated merely *per curiam:*

> We are satisfied that the *Spartan Southwest* opinion controls here since the charges and the question of their sufficiency are substantially the same as here. Accordingly, the judgment is vacated and the cause is remanded for further proceeding in consideration of other issues relating to the Commission's Demand (App. A 18).

Federal District Judge Daugherty sitting on the three judge panel of the Court of Appeals dissented strongly from this decision based on his judgment that the majority opinion in the *Spartan Southwest* case relied upon by the majority in this case "has been incorrectly decided":

> It seems crystal clear to me that [sic by] the language of 42 U.S.C. § 2000e-5(a) Congress intended to differentiate between the contents of a charge filed by an aggrieved person or employee and a charge filed by a member of the Commission. More is required in a charge filed by a member of the Commission. His charge must set forth the facts upon which it is based. This is clearly the Congressional mandate. This is not required of an aggrieved person or employee. He may indulge in bald conclusions. The reasons for such a differential are readily apparent and the distinction has a rational basis. The language of Congress intending the difference is clear. (App. A 18-19).

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REASONS FOR GRANTING THE WRIT

1. THE UNPRECEDENTED "COMMISSIONER'S CHARGE" STATES A BALD CONCLUSION WITHOUT SPECIFYING A SINGLE FACT, AND IS INVALID UNDER THE ACT, 42 U.S.C. §2000e-5(a), AND AS AMENDED.

This case presents a question of great importance and of first impression under the Civil Rights Act of 1964 as amended. The Court of Appeals in its *Spartan Southwest Inc., v. EEOC, Supra,* relied upon four other United States Appeals Court decisions, but none involved charges even similar to that involved here. The first such case relied upon by the Court was that of *Boatwaters Southern Paper Corporation v. EEOC,* 428 F.2d 799 at 800 (6th Cir. 1970), cert. den., ____ U.S. ____, 2 FEP Cases 1120 (1970) wherein the charge alleged:

> [The Company] has engaged in the following unlawful employment practices.
>
> 1. Maintenance of racially restricted job classifications.
>
> 2. Discriminatory use of tests, restricting Negro employees to lower paying jobs.
>
> 3. Denial to Negro employees of opportunity to participate in apprenticeship and on-the-job training programs.

The next case relied upon by the Court of Appeals was *Graniteville Co. v. EEOC,* 438 F.2d 32 at 34 (N. 1) (4th Cir. 1971) where the charge was filed by an individual aggrieved person, and not by an EEOC Commissioner, and which individual charge stated:

> The employment practices of my employer discriminates against Negros within the meaning of Title VII of the Civil Rights Act of 1964. Negros are hired to the traditional Negro jobs and regardless of length of service, Negros are not promoted or considered for better jobs as are the white employees. We, the Negro employees, are harassed and subjected to different conditions than those afforded to white employees. We are placed in fear always of losing our employment; even the dining concession stands and the locker and

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> toilet facilities are allowed to be segregated on the basis of race, as are the jobs and advancement opportunities. White employees are treated fairly in every instance. We, the Negros, are consistently treated differently in every way coming within the meaning of Title VII of the Civil Rights Act of 1964. Even the EEOC posters are not conspicuously displayed.

In *Graniteville Co. v. EEOC, supra* the Court characterized that individual charge as indicating racial classification of jobs, failure to promote members of the Negro race or give Negros equal consideration for better jobs, harassment of Negros, placing Negros in fear of losing their jobs, and the use of segregated concession stands and locker and toilet facilities, all of which the Court held to be allegations of clear violations of the Civil Rights Act of 1964, 438 F.2d at 35.

The third case relied upon by the Court of Appeals was *Local 104, Sheet Metal Workers International Association v. EEOC*, 439 F.2d 237 at 240 (9th Cir. 1971) where the charge specified a clear unlawful employment practice under the Act as follows:

> [The Union] discriminatorily restricted Union membership of minority group members because of race or national origin. [It should be noted that the Act in 42 U.S.C.A. §2000e-2(c) (2) makes it an unlawful employment practice for a Union to "limit" its "membership" because of race. App. D 37]

The fourth and last case relied upon by the Court of Appeals for its decision was that of *General Employment Enterprises, Inc. v. EEOC*, 440 F.2d 783 (7th Cir. 1971) where the charge alleged a blanket refusal to hire "Negro and Jewish people."

The charge in each of the above cited four cases relied upon by the Court of Appeals below alleged specific factual practices engaged in by the charged party and which were clear violations of the Act. Now compare those charges with the above cited charge in the instant case:

> [The Company] has violated and continues to violate Section 703(a) of the Civil Rights Act of 1964 by discriminating

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against Negros, American Indians, and Spanish Surnamed Americans on the basis of race or national origin, respectively, with respect to recruitment and hiring in that Respondent discriminatorily fails or refuses to recruit or hire Negros, American Indians or Spanish Surnamed Americans *in the same manner* as it recruits and hires others. (Emphasis added)

The conclusory charge sustained by the Court of Appeals below is unprecedented under the Civil Rights Act of 1964.

This charge completely fails to give notice to the Company of any specific practice challenged. The bizarre nature of this conclusory assertion is indicated in that company action to contact numerous minority recruitment sources in its hiring program for minority personnel, beyond such action for non-minority personnel, would here constitute a basis for a charge of violation of the Act. Surely the "Commissioner's Charge" here intends no such result. The assertion of a failure to recruit and hire "in the same manner" when applied to minority recruitment and hiring is, of course, accordingly a complete non-sequitur.

Moreover, the decision of the Court of Appeals, based upon its *Spartan Southwest, Inc. v. EEOC, Supra,* decision, clearly presents a direct conflict with the decision of the Court of Appeals for the Fourth Circuit on the requirements for a valid change under the Act. In *Graniteville Co. v. EEOC, Supra,* the Court of Appeals for the Fourth Circuit held that a mere conclusion of Title VII violations, by way of a "general description" as the Court of Appeals below phrased it, would not constitute a valid charge. In *Graniteville Co. v. EEOC, Supra,* the Court held:

> The charge does not simply allege in conclusory terms the existence of Title VII violations, but specifies the existence of a discriminatory promotion policy, racially classified jobs and specific segregated facilities. The law requires no more. 438 F.2d at 38-39.

The three dissenters to the *Spartan Southwest v. EEOC, Supra,* majority opinion, specifically rejected that thinking of the majority of the Court *en banc.* They pointed out that the

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requirement that the charge set forth the facts upon which it is based concerning an unlawful employment practice

> . . . must have some significance and an ordinary reading of the Section leads to the conclusion that a distinction between charges filed by an aggrieved person and by a Commissioner was intended by Congress. It would appear that Congress did not wish to require an employee or a person who was directly involved to be required to do anything more than make a charge in writing. It is certainly reasonable to place a greater requirement on a member of the Commission. To reach a contrary result is either to ignore the requirement entirely, as does the majority, or to apply it to both the aggrieved person and a Commissioner. (App. B 25)

2. THE UNPRECEDENTED "COMMISSIONER'S CHARGE" COMPLETELY OMITS AN ALLEGATION OF ANY UNLAWFUL EMPLOYMENT PRACTICE AS DEFINED IN THE ACT, AND IS INVALID UNDER THE ACT, 42 U.S.C. §§ 2000e-2(a) (1) and (2) and 5(a), AND AS AMENDED.

Again, this case presents an important question of first impression under the Civil Rights Act of 1964, as amended, since the charge here is held valid even though it fails to allege a statutorily defined unlawful employment practice. No provision of §703(a) (1) or (2), 42 U.S.C.A. §2000e-2(a) (1) or (2), as amended makes it an unlawful employment practice to refuse to recruit and hire minority group persons "in the same manner" that the Company may recruit and hire others. The Civil Rights Act of 1964 specifies, however, that a Commissioner's charge or any other charge must specify an unlawful employment practice as defined in the Act:

> Whenever . . . a written charge has been filed by a member of the Commission where he has reasonable cause to believe that a violation of this Subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer . . . has engaged in an *unlawful employment practice*, the Commission shall furnish such employer . . .

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with a copy of such charge .... (Emphasis added) 42 U.S.C. §2000e-5(a)

The amended Act in 42 U.S.C.A. § 2000e-5(b) is as clear as the original Act in requiring the allegation of an unlawful employment practice as defined elsewhere in the Act. That section requires as follows:

> [The charge set forth] the date, place and circumstances of the *alleged unlawful employment practice.* (Emphasis added)

The Court below concluded that all that is required to have a sufficient and completely valid charge under the Act is a "general description" to "activate the discovery process." (App. B 22). The Court majority below reached that conclusion because "the only rational approach" to the question regarding the setting forth in the charge of the factual basis for it "is a non-technical one which is concerned not with the niceties of form but rather with the broad substantial objectives of the measure." (App. B 24).The Court below then emphasized that its interpretation is intended to permit an EEOC investigation *beyond* the transaction described in the EEOC Charge. (App. B24).By this decision the Court sustained a charge which does not allege an unlawful employment practice as defined in the Act, on the basis that the statute is only a discovery device for the Commission and that proper allegation of a statutory unlawful employment practice is not required. The charged party under this interpretation has no protection against invalid charges. The express language and intent of the Statute is directly to the contrary. The legislative history of the original Act makes this clear.

During Congressional debates prior to passage of the Act, during which proponents of the Senate Bill supplied memoranda in support thereof and after which specific questions were raised and answered, Senator Clark answered a Senator Dirksen question as follows, which is reported in the Congressional Record:

> What protection is afforded to an employer from fishing expeditions by investigators in their zeal to enforce Title VII? 110 Cong. Rec. 7216.

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The answer by Senator Clark reprinted in the Record was, first, that the EEOC investigation would be based upon a "specific charge," 110 Cong. Rec. 7214, and further that:

> The employer is entitled to a day in Court *before* the Commission inspects any records; he can contest the subpoena. Private rights will be amply protected by the Courts (Emphasis Added) 110 Cong. Rec. 7216

3. THIS CONCLUSORY "COMMISSIONER'S CHARGE" WHICH DOESN'T ALLEGE ANY UNLAWFUL EMPLOYMENT PRACTICE WILL BECOME THE STANDARD FOR "COMMISSIONER'S CHARGES" THROUGHOUT THE NATION, WHICH WILL COMPLETELY EMASCULATE CONGRESSIONALLY MANDATED PROTECTIONS FOR CHARGED PARTIES.

The overriding significance of the decision of the Court of Appeals below in this case validating this charge, which does not specify a single fact and which does not allege any unfair employment practice as defined in the Act, is threefold. First, these kind of conclusory charges will become the standard for EEOC Commissioner Charges. Such charges cannot be successfully defended against by charged parties because such parties are not supplied with sufficient information to even determine what unlawful practice they are alleged to have committed. Conversely, the EEOC Commissioner faces the least risk in proceeding on such charges since, as here, such action cannot be successfully challenged in the courts. And under the Amended Act, the EEOC is now given the power to enforce its own charges by filing its own lawsuits in Federal District Courts. 42 U.S.C.A. § 2000e-5(f) (1), (App. D 38).

Secondly, such conclusory charges make it impossible for a charged party to determine whether the charge is timely filed within the original 210 day period (42 U.S.C. § 2000e-5(d)) now the 300 day period (42 U.S.C.A. § 2000e-5(e)) subsequent to the occurrence of the alleged unlawful employment practice. (App. D 36). Further, it is impossible to properly measure relevancy of documentary evidence sought by the original "Demand" procedure, (42 U.S.C. § 2000e-9(a), (c), or the current "Subpoena" procedure under the National Labor

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Relations Act, as amended, (42 U.S.C.A. § 2000e-9), (App. D 33-35), since such relevancy can only be measured against the charge itself. It is axiomatic that a Commissioner's charge which does not specify any facts and which does not allege an unlawful employment practice as defined in the Act cannot serve to properly limit the scope of documentary evidence demanded thereon.

Thirdly, such a charge based upon a failure to recruit and hire from certain minority group members "in the same manner" as "others" is designed to usher in a proportional recruiting and hiring system, requiring that preferences be granted to persons based upon race or national origin, which preferential system Congress outlawed in the Act in 42 U.S.C. § 2000e-2(j), (App.D 37) and which provision was not amended by the 1972 Act. Such preferential recruiting would be in direct conflict with a decision of this Court, which refused long ago to sanction such "proportional" or "quota" hiring in *Hughes v. State of California,* 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1949) when it struck down picketing by minority groups to force the hiring of minority persons in proportion to the number of minority group persons patronizing the store being picketed.

It must be emphasized that the instant Commissioner's charge is not one which alleges that the charged party refuses to recruit and hire minorities. The EEOC here seeks recruiting and hiring "in the same manner," which clearly requires a company to recruit and hire minority persons on the basis of the percent they comprise in the population of the area involved. The same would be required for recruiting and hiring of non-minorities, the "others" referred to in this charge. Thus, on such a proportional or percentage system, the recruiting and hiring practices of the employer would be done "in the same manner" for minorities and "others." In fact, this is the only basis on which recruiting and hiring could be done in exactly the same manner for both groups.

Such a requirement is beyond the Act, as amended. Not only is recruitment activity not included in the statutory definition of employer unfair employment practices, as shown above herein, but also the Act expressly precludes such preferential hiring based upon race or national origin or ancestry. 42 U.S.C. § 2000e-2(j).

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CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY 1972 TERM

ADOLPH COORS COMPANY, Petitioner-Appellee,	)	
v.	)	NO. 71-1156
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant-Appellant.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. C-1698)

Earl K. Madsen of Bradley, Campbell & Carney, Golden, Colorado (Leon N. Bradley with him on the brief) for Appellee

Charles L. Reischel, Attorney, Equal Employment Opportunity Commission (Stanley P. Hebert, General Counsel, John de J. Pemberton, Jr., Deputy General Counsel, and Julia P. Cooper, Chief, Appellate Section, Equal Employment Opportunity Commission, on the brief) for Appellant

---

Before HOLLOWAY and DOYLE, Circuit Judges, and DAUGHERTY, District Judge.

PER CURIAM

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This is an appeal from a judgment of the District Court setting aside a demand of the Equal Employment Opportunity Commission for access to evidence and compliance to give testimony under oath. Without considering other questions raised by appellee's petition to set aside the Commission's demand, the District Court concluded that the initial Commissioner's charge was invalid for failing to state facts as required by 42 U.S.C.A. § 2000e-5(a), and that all proceedings based thereon were invalid. 320 F. Supp. 1025.[1]

Disposition of this appeal has been deferred pending the en banc opinion on a similar question in Sparton Southwest, Inc., v. Equal Employment Opportunity Commission, ____F.2d____ (10th Cir., filed June 14, 1972). We are satisfied that the *Sparton Southwest* opinion controls here since the charges and the question of their sufficiency are substantially the same as here. Accordingly, the judgment is vacated and the cause is remanded for further proceedings and consideration of other issues relating to the Commission's demand.

DAUGHERTY, District Judge, dissenting:

I dissent to vacating the judgment and remanding the case for further proceedings as I feel that the majority opinion in *Spartan Southwest, Inc.* v. *Equal Employment Opportunity Commission, et al.*, ____F.2d____, (Tenth Cir. 1972) relied on herein by the majority opinion, has been incorrectly decided.

It seems crystal clear to me that the language of 42 U.S.C. § 2000e-5(a)[2] Congress intended to differentiate between the

---

[1] The Commissioner's charge is set forth in full in the District Court's opinion, 320 F. Supp. at 1025 - 1026. In substance the charge states that the Commissioner had reasonable cause to believe that appellee was discriminating against Negroes, American-Indians and Spanish surnamed Americans on the basis of race or national origin with respect to recruitment and hiring.

[2] This section provides in pertinent part:

> "(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this sub-chapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice * * *"

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contents of a charge filed by an aggrieved person or employee and a charge filed by a member of the Commission. More is required in a charge filed by a member of the Commission. His charge must set forth the facts upon which it is based. This is clearly the Congressional mandate. This is not required of an aggrieved person or employee. He may indulge in bald conclusions. The reasons for such a differential are readily apparent and the distinction has a rational basis. The language of Congress intending the difference is clear.

To fail to recognize this pertinent statutory distinction is to ignore Congress and usurp its legislative function. This I decline to do. I believe the dissenting opinion in *Spartan Southwest, supra*, correctly decides the point in issue.

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APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM, 1972

SPARTON SOUTHWEST, INC., Petitioner-Appellee,	)	
v.	)	
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TOM E. ROBLES, AREA DIRECTOR, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and VINCENTE T. XIMENES, COMMISSIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Respondents-Appellants.	)	No. 668-70
UNITED NUCLEAR-HOMESTAKE PARTNERS, Petitioner-Appellee,	)	
v.	)	No. 669-70
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and VINCENTE T. XIMENES, Respondents-Appellants.	)	

ON PETITION FOR REHEARING EN BANC

Submitted on the briefs.

Before LEWIS, Chief Judge, and HILL, SETH, HOLLOWAY, McWILLIAMS, BARRETT and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

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We are here called on to determine the sufficiency of a Commissioner's charge of employment discrimination, which charge was instituted pursuant to 42 U.S.C. §2000e-5(a), a provision of the 1964 Civil Rights Act. The trial court ruled that the charge was insufficient in failing to set forth the facts upon which it was based. We here conclude that the charge was sufficient to comply with the requirement of the relevant statutory provision.[1]

The charges herein are substantially the same in respect to each of the respondents. The charging part of each complaint eliminating the formal parts is as follows:

"COMMISSIONER'S CHARGE

• • •

"I have reasonable cause to believe that the above employer is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate section 703 of the Civil Rights Act of 1964 by discriminating against Negroes, Indians and Spanish Surnamed Americans on the basis of race and/or National Origin with respect to recruiting and hiring and other terms and conditions of employment, *inter alia:*

"Respondent discriminatorily fails and/or refuses to recruit and/or hire Negroes, Indians and Spanish Surnamed Americans in the same manner it recruits and/or hires Anglos.

"Respondent discriminatorily maintains occupational categories that are restricted to exclude Negroes, Spanish Surnamed Americans and Indians."

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[1]Section 2000e-5(a) provides in pertinent part:

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice • • •

The controversial wording is that which appears in parentheses.

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The Sparton Southwest complaint adds the following having to do with sex:

> "Respondent discriminatorily maintains separate job classifications on the basis of sex."

The determinative question is thus seen as whether a general description is sufficient to activate the discovery process or whether evidence must be particularly laid out. We have not heretofore considered this specific question although in United States v. Gustin-Bacon Division, Certainteed Products Corp., 426 F.2d 539 (10th Cir. 1970), we construed 42 U.S.C. § 2000e-6(a) which is the section which authorizes the Attorney General to file an action in federal court. It is true that § 2000e-6(a) merely requires the Attorney General to have reasonable cause to believe that if any person "* * * is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter * * *", the Attorney General may bring a civil action upon setting forth the facts pertaining to such pattern or practice. This court upheld a complaint which contained only conclusions of fact; in so doing we reasoned that it is not the intent of Congress to alter the fundamental pleading philosophy which obtains in federal courts. The court did point out in that case that the fact requirement of § 2000e-5(a) is different. We disagree with the contention that *Gustin-Bacon* anticipated and ruled on the question which is now before us. We do not consider this reference as any binding commitment. In our view, the reasoning and spirit of *Gustin-Bacon* is fully in accord with the decision which we reach here. The other circuits which have considered the identical question before us have ruled that complaints similar to the present ones were sufficient. See General Employment Enterprises, Inc. v. Equal Employment Opportunity Commission, 440 F.2d 783 (7th Cir. 1971); Bowaters Southern Paper Corporation v. E.E.O.C., 428 F.2d 799 (6th Cir. 1970); Graniteville Company (Sibley Division) v. E.E.O.C. (private complaints), 438 F.2d 32 (4th Cir. 1971); and Local 104 Sheet Metal Workers International Association v. E.E.O.C., 439 F.2d 237 (9th Cir. 1971).

In *Bowaters* the exact issue was involved, and the court determined that it was sufficient to describe the types of discrimination which were being practiced.

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Similarly, in *Graniteville* general descriptions were upheld, the court saying that to require more facts would "be tantamount to requiring a prima facie case as an element of the initial charge." 438 F.2d at 38.

In *Sheet Metal Workers International Association* the charge was much less specific than in that at bar. In overruling the contention of the Union the court pointed out that in these days of discovery in advance of trial "it would be incongruous for Congress to create an administrative agency to function in a new sensitive and socially and economically important field", and at the same time curtail the agency's functions in investigation and persuasion. See 439 F.2d at 242.

In *General Employment Enterprises, Inc.* the Commissioner's charge simply alleged that the employer discriminatorily failed or refused to hire Negroes or Jewish people. Again that court pointed out that the charge did no more than initiate an administrative fact finding and conciliation proceeding and did not call for the imposition of pleading standards required by the Federal Rules of Civil Procedure.

Appellees at bar would have us impose a standard even more strict than that required by our Rules of Civil Procedure, notwithstanding that the pleadings are even less significant in the administrative process than in the judicial.[2]

In Love v. Pullman, 404 U.S. 522 (1972), the Supreme Court dealt with provisions of §§706(b) and (d) of the Act which require the E.E.O.C. to abstain in order to allow state agencies to consider discrimination complaints prior to E.E.O.C. action. The Court concluded that the E.E.O.C. policy of referring charges to the appropriate state agency satisfied the statutory requirement that no complaint be filed with the E.E.O.C. until the state agency has had at least 60 days to act and that the complaint with the E.E.O.C. be filed within 30 days of the termination of state proceedings (i.e. that the 60 days did not in all cases have to run). The Supreme Court said:

> To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose

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[2]See 1 Davis, Administrative Law Treatise, §8.04 p. 523.

other than the creation of an additional procedural technicality. Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process. 404 U.S. at 526-527.

It is not the array of authorities alone which persuades us that the view we here adopt is correct; also a compelling reason is that the procedure urged by the appellees would thwart the operation of §2000e-5(a) of the Act. To require the charge to contain a specific bill of particulars would necessarily limit the scope of the investigation to the particular transaction or transactions meticulously described, and at the same time would curtail the discovery mission of the Commission, whereby the function Congress charged it to carry out would surely fail. Thus the only rational approach is a non-technical one which is concerned not with the niceties of form but rather with the broad substantial objectives of this measure.

Accordingly, we must hold that the charges in these two cases are sufficient and that the district court erred in dismissing the Commissioner's petitions for enforcement. Therefore, the judgments are reversed and the causes are remanded with instructions to the district court to reinstate the complaints and to enforce them.

Nos. 668-70 and 669-70.

SETH, Circuit Judge, dissenting, in which HILL and BARRETT, Circuit Judges, join:

The charge with which we are here concerned was filed by one of the Commissioners, and for its reference to the facts states that the Commissioner had "reasonable cause to believe" that the employer concerned was violating the Civil Rights Act. This was the sole reference to any facts upon which the charge, concerning recruiting and occupational categories, was based. The issue is whether the statute referring to charges requires a statement of facts when the filing is by a Commissioner rather than by an employee.

The statutory provision as to charges is in part as follows [42 U.S.C. § 2000e-5(a)]:

"Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, . . . provided that such charge shall not be made public by the Commission."

The requirement in parentheses must have some significance, and on ordinary reading of the section leads to the conclusion that a distinction between charges filed by an aggrieved person, and by a Commissioner was intended by Congress. It would appear that Congress did not wish to require an employee or a person who was directly involved to be required to do anything more than make a charge in writing. It is certainly reasonable to place a greater requirement on a member of the Commission. To reach a contrary result is either to ignore the requirement entirely, as does the majority, or to apply it to both the aggrieved person and a Commissioner. We made a similar distinction by way of dictum in United States v. Gustin-Bacon Div., Certain-Teed Products Corp., 426 F.2d 539 (10th Cir.), and it was the proper one.

There is no contention made that the charge contain a bill of particulars, only that it follow the statutory admonition that it set forth "facts." The question here is the filing of charges by a Commissioner, and certainly these can and should be based on "facts," otherwise the standard to govern the filing of charges is deleted from the Act.

It is always tempting to reach a conclusion based on general purposes and objectives, the remedial nature of the statute, and to ignore technicalities, but it should not be done in the face of statutory restrictions which Congress has enacted and which the board or agency wishes to ignore in an effort to simplify its administrative problems.

I would affirm the District Court as the charges must conform to the statute before the demand for books and records is proper.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. C-1698

ADOLPH COORS COMPANY,

Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

Bradley, Campbell, Carney & Johnson, by Mr. Earl K. Madsen, Attorney at Law, 1717 Washington Avenue, Golden, Colorado 80401, for Petitioner; Mr. Charles Reischel, Attorney at Law, Equal Employment Opportunity Commission, 1800 "G" Street, N.W., Washington, D.C. 20506, for Respondent.

MEMORANDUM OPINION AND ORDER

CHILSON, Judge

This proceeding was initiated pursuant to certain provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Section 703(a) of the Act, 42 U.S.C. § 2000e-2(a) provides that it shall be an unlawful employment practice for an employer to discriminate against any individual because of his race, color, religion, sex, or national origin.

Section 706(a) of the Act, 42 U.S.C. § 20004-5a (provides in pertinent parts):

"Whenever - - - a written charge has been filed by a member of the commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer - - - has engaged in an unlawful employment practice, the commission shall furnish such employer - - - with a copy of such a charge and shall make an investigation of such charge - - -. If the commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."

Pursuant to this provision of the Act, one of the commissioners filed a charge against the petitioner which reads as follows:

"COMMISSIONER'S CHARGE"

"Pursuant to Title VII, Section 706(a) of the Civil Rights Act of 1964, I charge the following employer with unlawful employment practices:

Adolph Coors Company
Golden, Colorado

"I have reasonable cause to believe that the above employer is within the jurisdiction of the Equal Employment Opportunity Commission and has violated and continues to violate Section 703(a) of the Civil Rights Act of 1964 by discriminating against Negroes, American Indians and Spanish Surnamed Americans on the basis of race or national origin, respectively, with respect to recruitment and hiring, in that the Respondent discriminatorily fails or refuses to recruit or hire Negroes, American Indians or Spanish Surnamed Americans in the same manner as it recruits and hires others.

/s/ Feb. 24, 1969 — /s/ Vicente T. Ximenes
Date — Commissioner"

Section 710 of the Act, 42 U.S.C. § 2000e-9(a) authorizes the commission, for the purposes of investigation of a charge filed, to require the production of documentary evidence relevant or material to the charge under investigation. Pursuant to this section, the commission served the following demand upon petitioner:

"UNITED STATES OF AMERICA
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DEMAND FOR ACCESS TO EVIDENCE AND
COMPLIANCE TO GIVE TESTIMONY UNDER OATH

"To: Adolph Coors Company
Golden, Colorado

RE: Vicente T. Ximenes
Charge File No.
TAL9C0362

ATTN: Mr. Russell Hargis
Vice President, Personnel
and Industrial Relations
Adolph Coors Company"

"Pursuant to Section 710 of the Civil Rights Act of 1964, you and each of you are hereby required and directed to furnish EVERETT O. WARE, a duly authorized representative of the Equal Employment Opportunity Commission, at Adolph Coors Company, Golden, Colorado, and all its area affiliates, on August 21, 1969, the information within your possession or control as set forth below:

"1. List of all employees showing date hired, job title, rate of pay, and ethnic or racial identity.

"2. Provide job qualifications for all job classifications.

"3. Copies of all employment tests used and the norms.

"4. List of promotions from July 1, 1968 to June 30, 1969, including job classification and ethnic or racial identity.

"5. List of job openings from July 1, 1968 to June 30, 1969.

"6. List of recruitment sources and copies of employment requests.

"7. Make available for examination all job applications, and copy as needed.

"8. List of all employees terminated for cause from July 1, 1960 to June 30, 1969.

"9. Make available for interview under oath any agent, official, or employee and examine any records of Adolph Coors Company relevant to Charge File No. TAL9C0362.

"10. Permission to tour and observe employees at work at the Adolph Coors Company facility at Golden, Colorado.

"11. Copy of most recent EEO-1 form.

"If you fail to comply with this DEMAND, the Commission may cause said Commission to apply to the United States District Court for an order requiring compliance with the DEMAND, as provided for in Sections 709 and 710 of the Civil Rights Act of 1964, 42 U.S.C. 2000e (8-9).

IN TESTIMONY WHEREOF I have hereunto set the seal of the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and have affixed my signature this 1st day of August, 1969.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Suite 1000, First National Bank Building,
East, 5301 Central Avenue N.E.,
Albuquerque, New Mexico 87108

/s/ Tom E. Robles
TOM E. ROBLES
Director
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION"

Section 2080e-9(c) provides in pertinent parts:

"Within 20 days after the service upon any person charged under Section 2000e-5 of this title of a demand of the commission for the production of documentary evidence, or for

permission to examine or copy evidence in conformity with the provisions of Section 2000e-8(a) of this Title, such person may file in the District Court of the United States for the Judicial District in which he resides, is found, or transacts business, and serve upon the commission, a petition for an order of such court modifying or setting aside such a demand."

Pursuant to this section, the petitioner filed a petition in this Court for an order to set aside or modify the demand of the commission. Although the petition raises many questions and issues, the threshold question is the validity or invalidity of the commissioner's charge, for it is upon this charge that all subsequent proceedings by the commission are based. If the commissioner's charge is invalid so also is the commission's demand for evidence and testimony under oath and we will not reach the other questions raised by the parties at this time.

The petitioner contends that the "demand" is based upon an invalid charge in that the charge does not comply with the requirement of Section 2000e-5(a), which requires that the charge set forth the facts upon which it is based.

Briefs have been filed in support of and in opposition to the petition, which thoroughly discuss the question of whether or not the charge in this case complies with this requirement of statute. The commissioner's charge in this case states that he has reasonable cause to believe that the petitioner has violated the statute by discrimination on the basis of race, color, and national origin, but the charge is completely devoid of any facts to support the conclusion of the commissioner that he has "reasonable cause to believe" that there has been a violation.

In the Court's opinion, the requirement that the charge set forth the facts upon which it is based, is a necessary prerequisite to a valid charge and a valid charge is a necessary prerequisite to a valid demand, pursuant to Section 2000e-9.

The arguments of the commission to the contrary and the authority cited in support of the commission's argument are

not persuasive. The Court should not and cannot ignore the Congressional mandate that the charge must be supported by the facts which led the commissioner to believe that a violation had occurred. The mere conclusory statement that the commissioner has "reasonable cause to believe" there has been a violation by discrimination is not a statement of fact. The Court concludes the charge does not meet the statutory requirements and is invalid; that the demand served upon petitioner is likewise invalid, and should be set aside.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the demand served upon the petitioner is hereby set aside. Final judgment setting aside the demand shall be forthwith entered.

Entered this 8th day of January, 1971.

BY THE COURT

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

ADOLPH COORS COMPANY, Petitioner,	]	Civil Action No. C-1698
vs.	]	
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Respondent.	]	JUDGMENT

PURSUANT TO and in accordance with Memorandum Opinion and Order heretofore entered on the 8th day of January, 1971; it is

ORDERED that judgment is hereby entered in favor of the petitioner, above-named, and against the respondent, above-named, and the respondent's Demand for Access to Evidence and Compliance to Give Testimony Under Oath heretofore served upon the petitioner is hereby set aside.

DATED at Denver, Colorado, this 14 day of January, 1971.

BY THE COURT:

HATFIELD CHILSON
U. S. District Judge.

APPENDIX D

STATUTORY MATERIAL

Investigatory Powers – Civil Rights Act of 1964 and Equal Employment Opportunity Act of 1972

a) 1964 Act – 42 U.S.C. §2000e-9(a), (b), (c), (d).

(a) For the purposes of any investigation of a charge filed under the authority contained in section 2000e-5 of this title, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

(b) If the respondent named in a charge filed under section 2000e-5 of this title fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 2000e-8(a) of this title, or if any person required to comply with the provisions of section 2000e-8(c) or (d) of this title fails or refuses to do so, or if any person fails or refuses to comply with a demand by the Commission to give testimony under oath, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him to comply with the provisions of section 2000e-8(c) or (d) of this title or to comply with the demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

(c) Within twenty days after the service upon any person charged under section 2000e-5 of this title of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with the provisions of section 2000e-8(a) of this title, such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand

in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this subchapter or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under subsection (b) of this section for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defendant could not reasonably have been aware of the availability of such ground of objection.

(d) In any proceeding brought by the Commission under subsection (b) of this section, except as provided in subsection (c) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

b) 1972 Act Amendments – 42 U.S.C.A. §2000e-9:

For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 161 of Title 29 shall apply.

29 U.S.C. §161 (1), (2), (3):

For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by sections 159 and 160 of this title –

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the

production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpena issued to any person, any district court of the United States or the United States courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence,

except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Time limits on filing charges:

a) 1964 Act – 42 U.S.C. § 2000e-5(d) (210 days).

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

b) 1972 Act – 42 U.S.C.A. § 2000e-5(e) (300 days).

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

No employer required to grant preferential treatment – 42 U.S.C. § 2000e-2(j), not amended by 1972 Act Amendments:

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Union unfair employment practices, 42 U.S.C. § 2000e-2(c) (1), (2), (3):

(c) It shall be an unlawful employment practice for a labor organization –

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

As amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C.A. § 2000e-2(c) (2) (Amendment underscored):

> (c) It shall be an unlawful employment practice for a labor organization –
>
> •
>
> (2) to limit, segregate, or classify its membership *or applicants for membership*, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

The Commission may now, under the amended Act, file Actions in Federal District Courts to enforce its own charges, 42 U.S.C.A. § 2000e-5(f) (1):

> (f) (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-845

ADOLPH COORS COMPANY,
PETITIONER

v.

UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 17-19) is reported at 464 F.2d 1270. The opinion of the district court (Pet. App. 26-31) is reported at 320 F.Supp. 1025.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1972, and a petition for rehearing was denied on October 4, 1972. The petition for a writ of certiorari was filed on December 7, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a Commissioner's charge stating that there was reasonable cause to believe that petitioner discriminated against members of certain minority groups on the basis of race and national origin by refusing to recruit and hire such persons was an adequate basis for an administrative investigation of petitioner's recruitment and hiring practices under Title VII of the Civil Rights Act of 1964.

STATUTE INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964 in effect at the time this proceeding was instituted, 42 U.S.C. 2000e *et seq.*, and as subsequently amended, P.L. 92-261, 86 Stat. 103 (March 24, 1972), are set forth in the Appendix to this brief.

STATEMENT

On February 24, 1969, Commissioner Vicente T. Ximenes of the Equal Employment Opportunity Commission filed with the Commission a charge of discrimination (Pet. App. 27) stating that he had reasonable cause to believe that petitioner was violating Title VII of the Civil Rights Act of 1964 by—

> discriminating against Negroes, American Indians, and Spanish Surnamed Americans on the basis of race or national origin, respectively, with respect to recruitment and hiring, in that [petitioner] discriminatorily fails or refuses to recruit or hire Negroes, American Indians, or Spanish Surnamed Americans in the same manner as it recruits and hires others.

Pursuant to Section 706(a) of Title VII [1] the Commission proceeded to investigate the charge. After petitioner refused to provide the information requested, the Commission, on August 1, 1969, issued a formal demand for access (Pet. App. 28-29).

Petitioner then instituted the present suit under Section 710(c),[2] seeking to set aside the Commission's demand on the ground that it was based on a charge that did not set forth sufficient facts to comply with Section 706(a) (Pet. App. 30).

The district court, holding that the Commissioner's charge was inadequate under Section 706(a), set aside the Commission's demand (Pet. App. 26-31). The court of appeals reversed, relying upon its earlier *en banc* decision in *Sparton Southwest, Inc.* v. *Equal Employment Opportunity Commission,* 461 F.2d 1055 (C.A. 10) (Pet. App. 20-25), which held that a Commissioner's charge need only describe generally the unlawful practices alleged since otherwise a charge would be held to "a standard even more strict than that required by our Rules of Civil Procedure, notwithstanding that the pleadings are even less significant in the administrative process than in the judicial" (Pet. App. 23).

ARGUMENT

Prior to the 1972 amendments to Title VII, Section 706(a), 42 U.S.C. 2000e-5(a), provided:

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[1] 42 U.S.C. 2000e-5(a) prior to the 1972 amendments; now Section 706(b) of the amended Title.

[2] 42 U.S.C. 2000e-9(c). This provision has been modified by the 1972 amendments, but the modifications are not relevant to this case.

> Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (*and such charge sets forth the facts upon which it is based*) that an employer * * * has engaged in an unlawful employment practice, the Commission shall * * * make an investigation of such charge * * *. [Emphasis supplied.]

Petitioner relies upon the parenthetical language of former Section 706 (a), which was deleted in the 1972 amendments to Title VII,[3] to support its argument that the charge in the instant case was deficient.

That language had uniformly been construed to require only "a sufficient allegation to give the EEOC notice of what it is to investigate and put the respondent

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[3] Section 706(b), as amended by P.L. 92-261, 86 Stat. 103, 104 (March 24, 1972), now provides:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer * * * has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer * * * and shall make an investigation thereof. *Charges* shall be in writing under oath or affirmation and *shall contain such information and be in such form as the Commission requires.* [Emphasis supplied.]

The Commission requires only that a charge be "a written statement sufficiently precise to identify the parties and to describe generally the action or practices complained of." 29 C.F.R. 1601.11(b), 37 Fed. Reg. 9215 (May 6, 1972). See also 29 C.F.R. 1601.11(b), 31 Fed. Reg. 10269 (July 29, 1966).

on notice of the practice or violation with which it is charged." *Graniteville Co.* v. *Equal Employment Opportunity Commission*, 438 F.2d 32, 38 (C.A. 4); accord *Bowaters Southern Paper Corp.* v. *Equal Employment Opportunity Commission*, 428 F.2d 799 (C.A. 6), certiorari denied, 400 U.S. 942; *Local No. 104, Sheet Metal Workers* v. *Equal Employment Opportunity Commission*, 439 F.2d 237 (C.A. 9); *General Employment Enterprises, Inc.* v. *Equal Employment Opportunity Commission*, 440 F.2d 783 (C.A. 7); *Sparton Southwest, Inc.* v. *Equal Employment Opportunity Commission*, 461 F.2d 1055 (C.A. 10). These decisions recognize that the primary purpose of a charge, whether filed by a private person or by a Commissioner, is simply to provide the full Commission with sufficient information to commence an investigation. *Jenkins* v. *United Gas Corp.*, 400 F.2d 28, 30 n.3 (C.A. 5). As the Tenth Circuit noted in *Sparton Southwest, supra*, it would be anomalous to require more specificity in a charge that merely institutes an investigation limited to finding reasonable cause than is required in a court action that seeks a judgment on the merits (Pet. App. 23). See also *Local No. 104, Sheet Metal Workers* v. *Equal Employment Opportunity Commission, supra*, 439 F.2d at 242.[4]

In the present case the Commissioner's charge provided sufficient notice to both the Commission and

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[4] The standard of notice held applicable to charges under Title VII is similar to that governing the sufficiency of administrative pleadings before other federal agencies. See, *e.g.*, *National Labor Relations Board* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418; *National Labor Relations Board* v. *Fant Milling Co.*, 360 U.S. 301.

petitioner. It alleged that the petitioner refuses to recruit, or to hire, Negroes, Spanish-surnamed Americans, and Indians in the same way that it recruits and hires others. Such allegations state a violation of Title VII. See, *e.g.*, *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (C.A. 8); *Lea* v. *Cone Mills Corp.*, 438 F.2d 86 (C.A. 4), affirming 301 F.Supp. 97 (M.D.N.C.). The court below correctly found the allegations to be sufficient to perform the function of giving notice of the practices to be investigated.

In any event, the issue presented here, which involves interpretation of statutory language, has no future significance in view of the deletion of that language in the 1972 amendments to Title VII (see note 3, *supra*).

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari should therefore be denied.

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JANUARY 1973.

APPENDIX

Section 706(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(a), provides:

> (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall

be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

Section 706(b) of Title VII of the Civil Rights Act of 1964, as amended, P.L. 92-261, 86 Stat. 103, 104 (March 24, 1972), provides:

> (b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission

shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

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